IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9215 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARSOTTAMBHAI RANCHHODBHAI PATEL - Petitioner(s)

Versus

SHARDABEN, WD/O.CHHOTABHAI SOMABHAI PATEL - Respondent(s)

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Appearance :

MR PS CHAMPANERI for Petitioner No(s).: 1.
None for Respondent No(s).: 1.
RULE SERVED BY DS for Respondent No(s).: 1 - 1.

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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 21/07/2005

ORAL JUDGMENT

1. By filing instant petition under Article 227 of the Constitution of India, the petitioner seeks to challenge the order dated 18.12.1998 recorded below application Ex.1 in Civil Misc. Application No.12 of 1996 by the learned Civil Judge (J.D.)., Borsad and also the order dated 29.3.2005 rendered in Civil Misc. Appeal No.85 of 2001 by the

learned District Judge, Kheda at Nadiad.

2. Respondents herein had filed RCS No.190 of 1983 against the petitioner herein which came to be decreed exparte as the advocate of the petitioner had died. The petitioner was not in know of the ex-parte decreeing of the said suit. Therefore, the petitioner had gone to contact his advocate Mr. M.K. Patel who was appearing in the trial court on his behalf. At that time the petitioner came to know that said Mr. M.K. Patel had died before seven years, i.e., much prior to the decreeing of the suit exparte. During the inquiry it was found that the suit was proceeded exparte and exparte decree came to be passed. The petitioner therefore filed an application being Civil Misc. Application No.12 of 1996 under Order 9 Rule 13 of the Code of Civil Procedure ('the Code' for short) praying to set aside the exparte decree passed against him. The learned trial Judge after hearing both the parties, passed the order to restore RCS No.190 of 1983 to its original file. Thereafter the learned trial Judge passed suo motu order below application Ex.1 cancelling the order passed by him on the ground that accidental slip was committed by the Court in passing the impugned order of restoration of RCS No.190 of 1983.

3. Aggrieved thereby the petitioner went in appeal by filing Civil Misc. Appeal No.85 of 2001 before the District Court, Kheda at Nadiad. The learned District Judge, Kheda at Nadiad who heard the appeal dismissed the appeal with cost which has given rise to the present petition at the instance of the original defendant.

4. This Court has heard Mr. P.S. Champaneri, learned advocate of the petitioner, perused both the impugned orders and also the averments made in the petition.

5. It may be noted that on perusal of the contents of Civil Misc. Application No.12 of 1996 filed by the present petitioner under

Order 9 Rule 13 of the Code, it is seen that there is an averment made therein that the advocate has died which has resulted into passing of the exparte decree and therefore prayer was made in the application to set aside the exparte decree. The learned trial Judge has registered the said application and also issued notice to the defendants. Thereafter after hearing both the parties, the learned trial Judge has passed order of restoration of RCS No.190 of 1983. Therefore, the said order has become final so far as the Court of learned Civil Judge (J.D.)., Borsad is concerned. Therefore there was no earthly reason for the learned Civil Judge (J.D.)., Borsad to cancel the said order by taking the matter suo motu. This Court fails to understand what accidental slip or omission has committed by the trial Court in passing the order of restoration which was required to be cancelled. Therefore, according to this court, the learned trial Judge has committed grave error in passing the said order on 18.12.1998.

6. Similarly, the learned District Judge, Kheda at Nadiad has also committed grave error in not setting aside the order dated 18.12.1998 by which the learned trial Judge has cancelled the order dated 31.7.1998 and restored the RCS No.190 of 1983 to its original file. The learned District Judge in para 12 of his judgment has said that it is the duty of the court to remedise the party by rectifying the mistake committed by the court and accordingly the court after giving an opportunity of being heard to the advocate for parties, has passed the order in question, which in his opinion is legal and valid and in consonance with the principles laid down by the Apex Court, which is absolutely an erroneous finding recorded by the learned District Judge. As discussed earlier, there was no earthly reason for the learned Civil Judge (J.D.)., Borsad to pass the order dated 18.12.1998 cancelling the order

dated 13.7.1998 restoring RCS No.190 of 1983 to its original file.

7. The learned trial Judge has observed that the petitioner ought to have filed application under Order 9 Rule 13 to set aside the exparte decree but the petitioner has failed to file such an application and filed an application under Order 9 Rule 8 of the Code for restoration of the suit. The said finding is erroneous. A perusal of the cause title of the application filed by the petitioner shows that the petitioner has filed the application under Order 9 Rule 13 of the Code to set aside the ex-parte decree.

8. In aforesaid view of the matter, both the orders which are impugned in this petition deserve to be quashed and set aside by allowing this petition.

9. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs result of which is that the order dated 18.12.1998 recorded below application Ex.1 in Civil Misc. Application No. 12 of 1996 by the learned Civil Judge (J.D.)., Borsad and the order dated 29.3.2005 recorded in Civil Misc. Appeal No.85 of 2001 by the learned District Judge, Kheda at Nadiad are hereby quashed and set aside and the order dated 31.7.1998 passed by the learned Civil Judge (J.D.),. Borsad restoring RCS No.190 of 1998 is confirmed and maintained. The learned Civil Judge (J.D.)., Borsad is directed to proceed with the RCS No.190 of 1983 in accordance with law as expeditiously as possible. Rule is made absolute.

(A.M. Kapadia, J.)

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